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6 BRIEF ON BEHALF OF RIVER TERMINALS CORPORATION, RESPONDENT.

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Supreme Court of the United States

OCTOBER TERM, 1958

No.

SOUTHWESTERN SUGAR AND MOLASSES CO., INC.,
Petitioner,

versus

RIVER TERMINALS CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1958

No.

SOUTHWESTERN SUGAR AND MOLASSES CO., INC.,
Petitioner,

versus

RIVER TERMINALS CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE FIFTH CIRCUIT

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Southwestern Sugar and Molasses Co., Inc., prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit rendered on April 9, 1958, reversing a decree of the United States District Court for the Eastern District of Louisiana decreeing River Terminals Corporation liable as a tower to Southwestern Sugar and Molasses Co., Inc., for damages to the Barge Peter B and a cargo of molasses laden therein, filed July 15, 1957 (R 367).

JURISDICTION

Jurisdiction to review this case upon Writ of Certiorari is based on 28 U.S. Code 1254 (1).

OPINIONS BELOW

The opinion of the district court is in the record (R 367).

The opinion of the Court of Appeals is in the record (R 379).

QUESTIONS PRESENTED

The questions presented by this petition are:

1. Whether River Terminals Corporation can escape liability for its negligence because of the tariff filed with the Interstate Commerce Commission containing the following provisions:

> "When shipments are transported in barges furnished by owners, shippers, consignees or parties other than the carrier, such barges and (or) cargoes will be handled at owner's risk only, whether the loss or damage is caused by negligence or otherwise".

2. Whether a tower can incorporate in its tariff an exculpatory clause releasing it from liability and from the consequences of its own negligence when this Court has held such re-

lease from negligence clauses as void and against public policy in Bisso vs. Inland Waterways Corporation, 349 U.S. 85, 75 S. Ct. 629 (1955).

3. Whether the Courts and not the Interstate Commerce Commission, as Respondent contends, are the proper forums for determining whether release from liability clauses are void as contrary to public policy.

STATEMENT

Petitioner instituted suit in the United States District Court for the Eastern District of Louisiana against River Terminals Corporation for damages to the Barge Peter B and loss of a cargo of molasses laden therein. The libel claimed, and the trial court found, that the barge sank and its cargo was lost as a result of negligent acts of River Terminals Corporation in navigation or management of the tow (R 367).

The Court of Appeals did not consider the case on the merits as Respondent had asserted a defense, which they held, if available to Respondent, would make it unnecessary to consider the case on the merits. The defense was that Respondent was a certificated common carrier under the terms of Part III of the Interstate Commerce Act, 49 U.S.C.A., 901 et. seg., and was requested to, and did, file tariff schedules with the Interstate Commerce Commission and that the tariff applicable to this movement relieved it from all liability for negligence or otherwise, the pertinent part as follows:

"When shipments are transported in barges furnished by owner, shippers, consignees or parties other than the carrier, such barges and (or) cargoes will be handled at owner's risk only, whether the loss or damage is caused by negligence or otherwise".

The Court of Appeals went on to say:

"As to whether the quoted provision of the tariff is void as against Public Policy we must at once recognize that in the recent case of Mississippi Valley Barge Line Company v. T. L. James & Co., Inc., et al, 5 Cir., 244 F. 2d 263, we held such a provision void and of no effect".

The Court stated that in the Mississippi Valley case, supra, the issues were identical to this case. This Court in the Mississippi Valley case held that this identical provision was void and of no effect citing Bisso vs. Inland Waterways Corp., 349 U.S. 85, stating as follows:

"It is sufficient to say that the validity of this claim has been definitely and conclusively settled against it in the Bisso case, and that, as pointed out in the opinion of the district judge below and in the brief of the appellees here, the fact that this illegal clause is embodied in a tariff cannot make it legal".

The Court stated that if they had incorrectly stated the law previously it was their duty to proceed in this cause as they believed the law required.

The Court of Appeal reversed and remanded the trial court in order to afford the appellee reasonable opportunity to seek administrative action before the Interstate Commerce Commission to test the validity of this exculpatory clause, otherwise to give full effect to the exculpatory clause.

SPECIFICATIONS OF ERRORS TO BE URGED

The Court of Appeals erred as follows:

1.

In holding that River Terminals Corporation can escape liability for its negligence because of the tariff filed with the Interstate Commerce Commission containing provision "such barges and (or) cargoes will be handled at owner's risk only, whether the loss or damage is caused by negligence or otherwise".

2.

In holding that a tower can take the identical clause that was held void and against public policy by this Court in Bisso vs. Inland Waterways Corporation, 349 U.S. 85, 75 S. Ct. 629 (1955), and merely by inserting it in its tariff release it from the consequences of its own negligence, thereby, circumventing the decision of the Court.

3.

In holding that the Interstate Commerce Commission and not the Courts is the proper forum for determining

whether release from liability clauses are void as contrary to public policy.

REASONS RELIED ON FOR GRANTING THE WRIT

The Court below has decided a federal question of law in conflict with the applicable decisions of this Court and had departed so far from the accepted and usual course as to call for an exercise of this Court's power of supervision.

ARGUMENT

This same Court of Appeal, in the case of Mississippi Valley Barge Line Company v. T. L. James & Co., Inc., et al, 5 Cir., 244 F. 2d 263 held the same provision as involved in the instant case void and of no effect. Writs were applied for and denied in the United States Supreme Court on November 12, 1957, 78 S. Ct. 121.

As the Court is well aware, the question of the validity of the exculpatory clause releasing a tower from its own negligence was litigated in the various courts all over the United States and in some circuits was held valid and in others as void and against public policy. This Court in the Bisso case, supra, granted writs in order that this question be finally set at rest. This Court held that such an exculpatory clause was void and of no effect. Towers as well as shippers were apparently relieved because prior to this they were constantly in a quandry as to their rights.

However, now the Court of Appeal has disregarded the Bisso case and its own decision in the Mississippi Valley case and has reversed the decision of the trial court hold-

ing the clause void and of no effect and has remanded the case in order that petitioner have opportunity to seek administrative relief before the Interstate Commerce Commission to test the validity of this exculpatory clause, otherwise to give full effect to the exculpatory clause.

The question of the validity of this clause has already been passed on by this Court and the Court of Appeal is apparently trying to divest the Courts from having jurisdiction to pass on this all important question. The question of the validity of this clause has been squarely before this Court and passed upon. To allow the Interstate Commerce Commission to have jurisdiction to pass on this would merely throw this matter back into the turmoil that existed prior to the Bisso case.

To leave this matter as it now stands can only lead to confusion which we feel sure this Court intended to put at an end with the granting of writs and the subsequent decision in the Bisso case. If this matter is not set at rest, undoubtedly shipping interests will again be faced with conflicting decisions from the various circuits as there was prior to the Bisso case.

It is respectfully submitted that there is here presented a proper occasion for the exercise of the supervisory power of this Court; that the decision of the Court of Appeals

should be reversed and the decree of the District Court should be reinstated.

SOUTHWESTERN SUGAR & MOLASSES CO., INC.,
Petitioner

By: _____
CLEM H. SEHRT,
Counsel for Petitioner

OF COUNSEL
Amos L. Ponder, Jr.
P. M. Flanagan
New Orleans, Louisiana
July 3, 1958.

CERTIFICATE

I certify that copies of the foregoing brief have been served upon opposing counsel of record by placing the same properly addressed in the United States mail with adequate postage affixed thereto.

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16,699

RIVER TERMINALS CORPORATION,
Appellant,

versus

SOUTHWESTERN SUGAR & MOLASSES COMPANY,
Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

(April 9, 1958.)

Before BORAH, TUTTLE and CAMERON, Circuit Judges.

TUTTLE, Circuit Judge: This is an appeal from a judgment for libelant for the loss of its cargo of molasses shipped by it on its own barge under tow of libelee-appellant. The libel claimed, and the trial court found, that the barge sank and its cargo was lost as a result of negligent acts of appellant in navigation or management of the tow.

The libelee asserted a defense which, if available to it, makes unnecessary consideration of the case on the merits. This defense is: Appellant was a certificated common carrier under the terms of Part III of the Interstate Commerce Act, 49 U.S.C.A. §901, et seq., which was required to, and which did, file tariff schedules with the Interstate Commerce Commission, and all of whose movements of cargo must be in accordance with its certificate and must, under the statute, conform to its filed tariffs, and that the tariffs applicable to this movement relieved it from all liability for negligence or otherwise.

The trial court, in its findings of fact, said:

> "This movement, according to the bill of lading issued by River on September 17, 1944, [the day the shipment commenced] was subject to River's tariff on file with the Interstate Commerce Commission, which tariff contained the following provisions:
>
> "'When shipments are transported in barges furnished by owner, shippers, consignees or parties other than the carrier, such barges and (or) cargoes will be handled at owner's risk only, whether the loss or damage is caused by negligence or otherwise.'"

Clearly, therefore, unless this provision of the tariff, which, of course, becomes a part of the contract, is to be ignored, the appellant is entitled to its benefit. As to whether the quoted provision of the tariff is valid

or is void as against public policy we must at once recognize that in the recent case of *Mississippi Valley Barge Line Company v. T. L. James & Co., Inc., et al,* 5 Cir. 244 F. 2d 263, we held such a provision void and of no effect. In a case which, so far as is germane to the present issue, was identical with this one, the defense was made that both the tariff and the bill of lading (there issued several weeks after the damage) relieved the towing company of liability. Referring to *Bisso v. Inland Waterways Corp.*, 349 U.S. 85, a case involving a private contract of towage, in which the parties by contract sought to relieve the tower from results of its own negligence, but which efforts the Supreme Court, in a 6-3 opinion, struck down as against public policy, this Court in an opinion participated in by the writer of this opinion, said:

> "It is sufficient to say that the validity of this claim has been definitely and conclusively settled against it in the Bisso case, and that, as pointed out in the opinion of the district judge below and in the briefs of the appellees here, the fact that this illegal clause is embodied in a tariff cannot make it legal."

Recognizing full well the unsettling effect of differing decisions within the same circuit in similar cases, and with every deference to the views of our colleagues who decided the Mississippi Valley Barge Line Company case, we deem it to be our clear duty to consider carefully what the law is on this important and far-reaching question. If we conclude that the law was incorrectly stated

by us previously, it is our duty to proceed in this cause as we believe the law requires.

There is an important factor in cases of this kind that was not commented on by this Court in the earlier case. It looms so large in the consideration we now give to this case that we think it likely that failure by the Court to discuss it in the Mississippi Valley opinion indicates that it was overlooked. That is the rule frequently stated by the Supreme Court that "Until changed, tariffs bind both carriers and shippers with the force of law." *Lowden v. Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 520; *Crancer v. Lowden*, 315 U.S. 631, 635.

There is then the equally important principle, also not discussed in our earlier opinion, that when tariffs embody terms whose initial adoption or subsequent modification involves issues of transportation policy, they ought not to be ignored, set aside, or otherwise set for naught, except after consideration by the Interstate Commerce Commission in the interests of a uniform and expert administration of the regulatory scheme laid down by the act. *United States v. Western Pacific Railway Co.*, 352 U.S. 59. An illustration in which the Supreme Court applied this principle is *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U.S. 422, and its subsequent appearance sub. nom. *El Dorado Oil Works, et al v. United States, et al*, 328 U.S. 12. And see, for cases in which the approved procedure was followed in the first instance, *Secretary of Agriculture v. United States, et al*, 350 U.S. 162, and *Lowden v. Simonds-Shields-Lonsdale Grain Co., supra.*

For the reasons made amply clear in Part III of the Interstate Commerce Act, 49 U.S.C.A. 901, et seq. Congress has confided to the Interstate Commerce Commission the devising and controlling of a regulatory scheme over the use of water carriers in foreign and domestic commerce. Under this law[1] every common carrier (and for the purpose of this discussion this includes towers as well as other carriers) is required to file and keep on file with the Interstate Commerce Commission its tariff "showing

[1]Sections 306(a) and 306(c) of Part III of the Interstate Commerce Act (49 U.S.C.A., Section 906):

"(a) Every common carrier by water shall file with the Commission, and print, and keep open to public inspection tariffs showing all rates, fares, charges, classifications, rules, regulations, and practices for the transportation in interstate or foreign commerce of passengers and property between places on its own route, and between such places and places on the route of any other such carrier or on the route of any common carrier by railroad or by motor vehicle, when a through route and joint rate shall have been established. Such tariffs shall plainly state the places between which property or passengers will be carried, the classification of property or passengers and, separately, all terminal charges, or other charges which the Commission shall require to be so stated, all privileges or facilities granted or allowed, and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such rates, fares, or changes, or the value of the service rendered to the passenger, shipper, or consignee.

- - -

"(c) No common carrier by water shall charge or demand or collect or receive a greater or less or different compensation for transportation subject to this part or for any service in connection therewith than the rates, fares, or charges specified for such transportation or such service in the tariffs lawfully in effect; and no such carrier shall refund or remit in any manner or by any device any portion of the rates, fares, or charges so specified, or extend to any person any privileges or facilities for transportation affecting the value thereof except such as are specified in its tariff: Provided, That the provisions of sections 1 (7) and 22 of Part I (which relate to transportation free and at reduced rates), together with such other provisions of such part (including penalties) as may be necessary for the enforcement of such provisions, shall apply to common carriers by water."

all rates, fares, charges, classifications, rules, regulations, and practices for the transportation of interstate or foreign commerce . . . between places on its own route," which shall plainly state, among other things, "any rules or regulations which in anywise change, affect, or determine any part of the aggregate of such rates, fares, or charges, or the value of the services rendered to the passenger, shipper or consignee." No carrier is permitted, under the Act to depart, in the furnishing of carriage, from its published tariffs.

The Commission may, under the Act, permit the filed tariffs to become effective or it may suspend them temporarily and either on its own motion or on the motion of an aggrieved party, inquire into the reasonableness and legality of any such rate or charge. Upon the resolution of any such inquiry, the Commission makes its order which is binding and final unless brought in question in the manner provided in 28 U.S.C.A. §§2321 2323. This is by suit against the United States and the Interstate Commerce Commission in which any interested party may intervene. It is tried by a statutory three-judge district court from which there is a direct appeal to the Supreme Court.

In the exercise of its statutory power the Commission permitted the appellant to file its questioned tariffs which, so far as this record shows, became immediately effective. The record does not disclose that either on the objection of shipper or otherwise any complaint or other challenge has ever been made with the Commission attacking the validity of the tariffs. We are asked to hold that, regard-

less of the circumstances prevailing in the towing industry which caused the appellant to fix its freight charges on the basis of appellee's assuming all the risks of negligent navigation of the tower, all of which must be assumed to have caused the Commission to "approve" the tariffs and which were deemed sufficiently acceptable to shippers as to prevent them from filing a complaint thereabout, there is a public policy that outlaws the exculpatory provision as a matter of law. This it is said, follows from the Court's decision in Bisso, *supra*, outlawing such a clause in a private contract of towage.

We think that when Congress has given to the Commission the extensive supervisory and regulatory power over the shipping industry with special responsibilities as to the prevention of monopolistic practices, and when the Commission permits the establishment of rates which limit the liability of carriers (presumably because there are, or may be required to be at the instance of a complaining shipper, alternative rates which place full liability on the tower) it has done so in the proper discharge of its responsibility to shipper, carrier and the public alike, and no overweening policy to invalidate one of the terms of such a tariff arises. Certainly not as a matter of law and without benefit of the Commission's initial inquiry and findings relating to the matter.

As is indicated in the concurring opinion, also expressed somewhat differently in the dissenting opinion in the Bisso case, the presence or absence of an overriding public policy

depends on facts and circumstances that in litigation between private parties must be developed in the record:

> "It may be fairer in the long run to let the tugboat operator free himself (by contract) from his own negligence and transfer the liability to the shippers who employ his services. But the very statement of the problem raises large questions of policy on which the present records throw no light. We would have to know much more about the economics and organization of the tugboat industry than we are offered here to fashion a new rule." 349 U.S. 85, 97.

And see the discussion on the public policy aspect of the private towage case at page 117 (dissenting opinion).

It would seem that as to common carriers, as to which Congress has given regulatory power to the Commission, the Commission's actions with respect to the terms of carriage should not be upset by the courts without their first having the factual background mentioned above first examined by the Commission and its relation to the assailed clause inquired into by it.

That there is no general public policy forbidding the exculpation of water carriers for their negligence is made amply apparent by the enactment by Congress more than

half a century ago of the Harter Act,[2] which in effect relieves carriers of liability for error or fault in navigation or management of the vessel if they have provided a seaworthy craft. Here appellant claims to be entitled to that very protection, since it says it is such owner of a vessel as is comprehended by the Harter Act. Without deciding that issue, since we think we do not reach it,[3] but assuming for the purpose of this discussion that the terms of the Act do not apply here because this is to be considered a movement of towage rather than "transportation of property," the existence of the law is not consistent with a theory that at all times and under all circumstances it is against public policy for water carriers to be free of liability for their own negligence. We think the Supreme Court did not so decide in Bisso and we think that such exemption from liability may, within the purview of the Interstate

---

[2] "§192. Limitation of liability for errors of navigation, dangers of the sea and acts of God. If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the things carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service." 46 U.S.C.A. §192.

[3] It is to be noted that in Mississippi Valley Barge Line Co. v. James, supra, on a slightly different record, we did hold that this statute was not applicable because towage rather than affreightment was involved. The Harter Act does not apply to towage and the difference here in that the trial court found as a fact that this movement was under the terms of a bill of lading subject to tariffs that were clearly adjusted to affreightment, but then concluded that this too was towage.

Commerce Act, be one of the matters with which the Commission may deal in approving rates, charges and services of the carriers whose activities it has the duty to regulate. In any event we conclude that we should not hold such a part of a published tariff void until the parties have proceeded administratively to have it set aside. The method of such administrative determination is clearly set forth in *General American Tank Car Corp. v. El Dorado Terminal Co., supra,* and see *United States v. Western Pacific R. Co., supra.*

Nor do we think that anything in Section 920(d)[4] of Part III of the Interstate Commerce Act requires any different holding. It provides only that none of the provisions of the statute shall of themselves be held to work any change in liabilities, etc. This is not to say that the Act does not authorize the Commission to permit the parties, by their contracts of carriage, when approved by the Commission, to make such changes in their respective liabilities.

The judgment is reversed in order to afford the appellee reasonable opportunity to seek administrative action before the Commission to test the validity of the challenged pro-

---

[4] "§920. Repeals.

. . . . .

"(d) Nothing in this chapter shall be construed to affect any law of navigation, the admiralty jurisdiction of the courts of the United States, liabilities of vessels and their owners for loss or damage, or laws respecting seamen, or any other maritime law, regulation, or custom not in conflict with the provisions of this chapter."
49 U.S.C.A. §920(d).

vision, otherwise to give full effect to the exculpatory clause and for further proceedings not inconsistent with this opinion.

REVERSED and REMANDED.

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Supreme Court of the United States

OCTOBER TERM, 1958

No. 155

SOUTHWESTERN SUGAR AND MOLASSES CO., INC.,
Petitioner,

versus

RIVER TERMINALS CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

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HAUSER PRINTING CO., INC., NEW ORLEANS.

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Supreme Court of the United States

OCTOBER TERM, 1958

No. 155

SOUTHWESTERN SUGAR AND MOLASSES CO., INC.,
Petitioner,

versus

RIVER TERMINALS CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

SUMMARY OF STATEMENT

In the interest of accuracy we re-state here summarily the facts and the litigation and how it has been resolved by the District Court and by the United States Court of Appeals for the Fifth Circuit.

A cargo of molasses laden by the shipper in shipper's barge, transported by River Terminals Corporation with its tugs from Reserve, Louisiana, to Texas City, Texas, and there delivered to the named consignee, sank at the consignee's wharf some thirty hours after it had been tied off there. River Terminals Corporation was a common carrier by water subject to Part III of the Interstate Commerce Act, and performed the transportation

pursuant to the provisions of its tariff on file with the Interstate Commerce Commission. It issued its bill of lading in the form and in the manner prescribed by the I.C.C. tariff.

Claiming damages for alleged negligent towage, the petitioner, Southwestern Sugar and Molasses Co., Inc., filed its libel in the United States District Court for the Eastern District of Louisiana, New Orleans Division; then by a supplemental libel alleged the issuance of the bill of lading and sought damages for breach of the contract of carriage evidenced by this bill of lading.

River Terminals Corporation answered both the original and the supplemental libels, denying any negligence, alleging proper delivery and claiming the benefit of Section 3 of the Harter Act[1] and of the exculpatory clauses in its I.C.C. tariff and in the bill of lading.

The District Court held that the movement was one of towage; that River Terminals Corporation had been guilty of negligence; and that the exculpatory clauses in River Terminals Corporation's I.C.C. tariff and bill of lading were invalid; and issued an interlocutory decree holding River Terminals Corporation liable and retained jurisdiction to fix damages. From this interlocutory decree River Terminals Corporation prosecuted its appeal to the United States Court of Appeals for the Fifth Circuit, assigning error on four grounds,[2] which may be summarized as follows: The Court erred first in holding that Southwestern Sugar and Molasses Co., Inc., had any interest in the barge which entitled it to maintain a libel for damage to it; second, in holding that in the

[1] 46 U.S.C. 192, Act of February 13, 1893, c. 105, § 3, 27 Stat. 445.

[2] The assignments of error are incorporated in the record, R. 361, and are reproduced in the Appendix, *infra*, p. 11.

movement of the molasses from Reserve, Louisiana, to Texas City, Texas, the River Terminals Corporation had been guilty of negligent towage; third, in failing to give effect to Section 3 of the Harter Act and not exonerating River Terminals Corporation; and, fourth, in failing to give effect to the exculpatory provisions incorporated in the tariff of River Terminals Corporation and to the terms and conditions of its bill of lading issued for this movement.

The Court of Appeals did not pass on the merits of this controversy,[3] but, holding that the Interstate Commerce Commission had the primary jurisdiction to determine the validity of the exculpatory clauses contained in the tariff which River Terminals Corporation had filed with the Interstate Commerce Commission, remanded the case to the District Court "in order to afford the appellee reasonable opportunity to seek administrative action before the [Interstate Commerce] Commission to test the validity of the challenged provision, otherwise to give full effect to the exculpatory clause and for further proceedings not inconsistent with this opinion".[4]

It is this decree of the Court of Appeals which the petitioner, Southwestern Sugar and Molasses Co., Inc., seeks to have reviewed by Your Honors on writ of certiorari.

---

[3] "The libelee asserted a defense which, if available to it, makes unnecessary consideration of the case on the merits. This defense is: Appellant was a certificated common carrier under the terms of Part III of the Interstate Commerce Act, 49 U.S.C.A. § 901 *et seq.*, which was required to, and which did, file tariff schedules with the Interstate Commerce Commission, and all of whose movements of cargo must be in accordance with its certificate and must, under the statute, conform to its filed tariffs, and that the tariffs applicable to this movement relieved it from all liability for negligence or otherwise." 253 F. 2d 924.

[4] 253 F. 2d 928.

REASONS FOR REFUSING THE WRIT

(1)

It has long been the policy of this Court not to review an interlocutory decree of a Court of Appeals, particularly where that decree does not dispose of the merits of the controversy. *Hamilton Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 36 S. Ct. 269; *John Simmons Co. v. Grier Bros. Co.*, 258 U.S. 82, 42 S. Ct. 196.[5] The fact that the Court of Appeals has not passed upon the merits of this controversy but has simply remanded the case to the District Court to make it possible for the Interstate Commerce Commission to pass upon the validity of the exculpatory clauses embodied in the tariff on file with it, is in itself sufficient ground for denying the petition for the issuance of a writ of certiorari. To grant a writ of certiorari at this stage of the proceedings and before the Court of Appeals has passed upon the merits of this controversy and the issues tendered by the River Terminals Corporation's first three assignments of error filed in the Court of Appeals, might well result in piecemeal consideration of this litigation by Your Honors, should it develop that at a later stage Your Honors' consideration of some other issue is required.

(2)

The petitioner, Southwestern Sugar and Molasses Co., Inc., complains that the decree which the Court of Appeals rendered in this case is contrary to that which it had rendered in *Mississippi Valley Barge Line Company v. T. L. James & Co., Inc., et al*, 244 F. 2d 263, in which Your Honors denied an application for a writ of certiorari.[6] That case, too, is at an intermediate stage.

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[5] "Peradventure the very fact that a final decree had not yet been entered might have been deemed a sufficient ground for refusing the writ." *John Simmons Co. v. Grier Bros. Co.*, *supra*.

[6] Petition for writ, p. 6.

The Court of Appeals had before it only an interlocutory decree of the District Court, which it affirmed on grounds which are clearly at variance with the grounds for its decision in the case at bar. When a panel of the Court of Appeals, two members of which differed from those that had decided *Mississippi Valley Barge Line Company —T. L. James*, had handed down its opinion in the case at bar, an application was delivered to the Clerk of the Court of Appeals in *Mississippi Valley Barge Line Company—T. L. James* either (a) to reconsider that case and render a judgment consonant with the one rendered in the case at bar, or (b) to grant leave to Mississippi Valley Barge Line Company to file a petition for a rehearing and a brief in support thereof, or (c) to grant leave to Mississippi Valley Barge Line Company to file in the District Court a "bill of review" or "libel of review". The Court of Appeals, taking cognizance of the fact that the appeal from the District Court was from an interlocutory decree only and that the matter is now pending in the District Court with no final decree rendered, denied leave to file the application of Mississippi Valley Barge Line Company, saying that inasmuch as "the cause is pending in the district court for final decision and on an appeal therefrom, this court has power to, and will, if then of the opinion it should do so, reverse its former decision and judgment and decide the cause as to it may then seem just and right, *Seagraves v. Wallace*, 69 F(2) 163 * * * ".[1]

We submit that because of the doubt which the United States Court of Appeals for the Fifth Circuit has cast on the correctness of its decision in *Mississippi Valley Barge Line Company—T. L. James*, that case does not constitute binding authority, and until the Court of

[1] The memorandum opinion of the United States Court of Appeals for the Fifth Circuit is reproduced in its entirety in the Appendix, *infra*, p. 12.

Appeals has again reviewed that case, to review the case at bar because it is at variance with *Mississippi Valley Barge Line Company—T. L. James* appears highly illogical.

Even were *Mississippi Valley Barge Line Company—T. L. James* final, that would not constitute such ground for Your Honors' granting a writ of certiorari as would exist were there a conflict between Courts of Appeal of two different circuits.[8]

(3)

It is quite obvious that the risk of loss of and damage to a vessel and cargo is of prime importance in fixing the rate to be charged for transporting them, whether the transportation be affreightment or towage. Risks of loss and damage to vessels and cargoes appear to be inevitably connected with marine transportation, and for more than two and a half centuries the practice has been prevalent of insuring against them. Procurement of such insurance entails the payment of premiums, and where the premiums are paid by the carrier they constitute an item of transportation cost. No carrier by water can be expected to transport a shipment where that carrier is subject to the risks of loss and damage for a rate at as low a level as it would charge if it were not subject to such risks, because in many instances if the marine insurance premium were added to the carrier's other costs for performing the transportation service the carrier's charge therefor to the shipper would be exceeded.

Accordingly, it must be presumed that in fixing or approving a water transportation rate the Interstate Commerce Commission must take into consideration the

[8] Such as contemplated by Supreme Court Rule 19.1(b).

expense of the marine insurance; and where the rate does not include anything for marine insurance to be procured by the carrier, then relieve the carrier of any risk for loss and damage to the vessel and cargo. On the contrary, where the risk of loss and damage to the vessel and cargo is to be the carrier's, then the Interstate Commerce Commission doubtless will fix the rate high enough to include the insurance premium as an item of cost.

However, all of these are matters for consideration by the Interstate Commerce Commission, and not by the Courts, and in the case at bar the Court of Appeals has properly so held, saying that Congress has entrusted the Interstate Commerce Commission with "the devising and controlling of a regulatory scheme over the use of water carriers in foreign and domestic commerce." [9] This holding, of course, follows Your Honors' decisions in *Lowden v. Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 59 S. Ct. 612; *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U.S. 422, 60 S. Ct. 325; *El Dorado Oil Works, et al. v. United States, et al*, 328 U.S. 12, 66 S. Ct. 843; *Secretary of Agriculture v. United States, et al.*, 350 U.S. 162, 76 S. Ct. 244; *United States v. Western Pacific Railway Co.*, 352 U.S. 59, 77 S. Ct. 161.[10]

Petitioner asserts that the *Bisso* Case [11] is authority for the absolute invalidity of the exculpatory clauses in River Terminals Corporation's tariff; however, as pointed out by the Court of Appeals, that case is not authority and there is no authority for holding invalid *per se* exculpatory clauses embodied in a carrier's tariff

[9] 253 F. 2d 925.

[10] See also *Far East Conference v. United States*, 342 U.S. 570, 72 S. Ct. 492, and *Public Utilities Commission of California v. United States*, ___ U.S. ___, 78 S. Ct. 446.

[11] *Bisso v. Inland Waterways Corporation*, 349 U.S. 85, 75 S. Ct. 629.

filed with and promulgated by the Interstate Commerce Commission.

In the *Bisso* Case there were involved the practices of a private tower not subject to the regulation of the Interstate Commerce Commission, and Your Honors envisaged the possibility of monopolistic practices. Monopoly is, of course, impossible in the case of regulated transportation, whether affreightment or towage. Further, as pointed out by the Court of Appeals, Your Honors in the *Bisso* Case took cognizance that

> "'It may be fairer in the long run to let the tugboat operator free himself (by contract) from his own negligence and transfer the liability to the shippers who employ his services. But the very statement of the problem raises large questions of policy on which the present records throw no light. We would have to know much more about the economics and organization of the tugboat industry than we are offered here to fashion a new rule.' 349 U.S. 85, 97, 75 S. Ct. 629, 636.
>
> "And see the discussion on the public policy aspect of the private towage case at page 117 (dissenting opinion)." [12]

The Interstate Commerce Commission should, and when its attention is properly directed to this issue doubtless will examine into the economics and organization of the towboat industry, and if it is dissatisfied with the practices which the certificated carriers by water have been indulging in for many years based on the provisions of their Interstate Commerce Commission tariffs, the Commission will provide a scheme for the transportation of vessels and cargoes at rates which will fully protect both shippers and carriers.

We submit that the issues of risks of loss of and

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[12] 253 F. 2d 926, 927.

damage to vessels and cargoes are indivisibly tied in with the level of rates to be fixed by the Interstate Commerce Commission as provided by Part III of the Interstate Commerce Act, and in determining that the validity of the exculpatory clauses in the respondent's tariff should be determined by the Interstate Commerce Commission in the first instance, the Court of Appeals has correctly disposed of that portion of this litigation.

CONCLUSION

We therefore submit that the petition for the issuance of a writ of certiorari should be denied in the present posture of this litigation, firstly because the Court of Appeals has not passed upon the merits of this controversy and the decree sought to be reviewed is interlocutory only; and secondly, because the Court of Appeals has correctly decided the one issue on which it has finally passed and there is no contrary final authoritative decision on this issue either in the Fifth Circuit or in any other circuit.

Respectfully submitted,

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